No. 89-1679

In The

Supreme Court of the United States

October Term, 1989

SUMMIT HEALTH, LTD., MIDWAY HOSPITAL MEDICAL CENTER, THE MEDICAL STAFF OF MIDWAY HOSPITAL MEDICAL CENTER, MITCHELL FELDMAN, AUGUST READER, M.D., ARTHUR N. LURVEY, M.D., JONATHAN I. MACY, M.D., JAMES J. SALZ, M.D., GILBERT PERLMAN, M.D., MARK KADZIELSKI and WEISSBURG and ARONSON, INC.,

Petitioners,

vs.

SIMON J. PINHAS, M.D.,

Respondent.

BRIEF OF THE CALIFORNIA ASSOCIATION OF HOSPITALS AND HEALTH SYSTEMS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE

Counsel for both petitioners and respondent have consented to the filing of this brief. The consents are being filed with this Court.

The California Association of Hospitals and Health Systems (CAHHS) represents approximately 540 California hospitals, the vast majority of the hospitals in California. CAHHS submitted an amicus curiae brief in this case in the Ninth Circuit in support of defendants' petition for rehearing and suggestion for rehearing en banc.

CAHHS has a vital interest in the present case because the case decides issues of great importance to California hospitals. Specifically, the issues concern when and under what circumstances a physician can bring a Sherman Act antitrust action in federal court based on the denial of that physician's staff privileges. CAHHS respectfully submits its amicus curiae brief is helpful because it explains the importance of this case beyond the effect it has on the immediate parties.

SUMMARY OF ARGUMENT

The Ninth Circuit has allowed a physician to proceed with a Sherman Act antitrust action based on the termination of his hospital staff privileges, a type of case that has been said to be "at best at the very margin of the Sherman Act's coverage." *Furlong v. Long Island College Hosp.*, 710 F.2d 922, 927 (2d Cir. 1983). The Ninth Circuit applied this Court's opinion in *Patrick v. Burget*, 486 U.S. 94 (1988) and held that, like Oregon in *Patrick*, California does not sufficiently supervise the hospital peer review process to shield peer review participants from antitrust liability under the state action doctrine. *Pinhas v. Summit Health, Ltd.*, 894 F.2d 1024, 1028-1030 (9th Cir. 1989).

The Court of Appeals, however, also addressed an issue not raised in *Patrick*, whether plaintiff has alleged a nexus with interstate commerce sufficient to establish jurisdiction under the Sherman Act. It is this issue in particular which merits this Court's attention. The interstate commerce jurisdictional issue is appropriate for this Court's review for two reasons: (1) the circuits are in conflict on the issue and (2) resolution of the conflict will likely determine whether a large number of cases, particularly those involving denial of hospital staff privileges, will be brought in state courts or in federal court. The conflict arises from a difference in interpretation of this Court's opinion in *McLain v. Real Estate Bd. of New Orleans*, 444 U.S. 232 (1980).

The Ninth Circuit's opinion in this case follows the circuit's longstanding interpretation of *McLain* (albeit for the first time in a staff privileges case) that the Sherman Act jurisdictional requirement is satisfied merely by showing the defendant's general business activities, not necessarily the alleged anticompetitive conduct, affect interstate commerce. Thus, the court held plaintiff "need *not* . . . [show] the effect on interstate commerce caused by the alleged conspiracy to keep *him* from working," but only "that 'as a matter of practical economics' the activities of the appellees – the peer review process *in general* – have a 'not insubstantial effect on the interstate commerce involved.' " *Pinhas v. Summit Health, Ltd.*, 894 F.2d at 1032 (emphasis added). The Third and Eleventh Circuits are generally in accord with this view. In contrast, the Tenth Circuit, followed by the First, Second, Sixth, Seventh, Eighth, and, possibly, the Fourth Circuits, has

held, "we do not believe *McLain* signals a shift in analytical focus away from the challenged activity and towards the defendant's general or overall business. The analytical focus continues to be on the nexus, assessed in practical terms, between interstate commerce and the challenged activity." *Crane v. Intermountain Health Care, Inc.*, 637 F.2d 715, 724 (10th Cir. 1981) (en banc).

Choosing between these different approaches will significantly impact the number of staff privileges cases that can be brought in federal court as Sherman Act actions rather than in state court. Denying hospital privileges to a single physician rarely will affect interstate commerce, while the general business activities of a hospital frequently will. Moreover, if the jurisdictional rule is resolved so as to give physician plaintiffs the option to maintain their staff privileges cases as Sherman Act actions, they will most likely opt for the federal forum, at least in California, because of significant procedural advantages federal court offers.

Finally, we discuss briefly why the Ninth Circuit's interpretation of *McLain* should be rejected in favor of that of the majority of the circuits. Focusing on the interstate commerce impact of a defendant's general business activities rather than of the particular alleged anticompetitive conduct will lead to arbitrary and disparate results unconnected to the purposes of the Sherman Act.

ARGUMENT

I.

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE CIRCUITS CONCERNING WHETHER THE SHERMAN ACT JURISDICTIONAL REQUIREMENT CAN BE SATISFIED WITHOUT SHOWING THAT THE PARTICULAR ALLEGED ANTITRUST VIOLATION AFFECTS INTERSTATE COMMERCE.

Ten years ago, this Court held Sherman Act jurisdiction could be established by showing that "the defendants' activity is itself in interstate commerce or, if it is local in nature, that it has an effect on some other appreciable activity demonstrably in interstate commerce." *McLain v. Real Estate Bd. of New Orleans*, 444 U.S. 232, 242 (1980). Under the latter test, a split soon developed among the circuits concerning whether the "defendants' activity" which must affect interstate commerce is the defendants' general business activities or the specific anticompetitive conduct.

Within two months of the *McLain* opinion, the Ninth Circuit interpreted *McLain* as holding "that it was not necessary for the alleged antitrust violations complained of to have affected interstate commerce as long as defendants' business activities, independent of the violations, affected interstate commerce." *Western Waste Service Systems v. Universal Waste Control*, 616 F.2d 1094, 1097 (9th Cir.), *cert. denied*, 449 U.S. 869 (1980). Less than a year later, the Tenth Circuit came to the opposite conclusion, holding that "we do not believe *McLain* signals a shift in analytical focus away from the challenged activity and towards the defendant's general or overall business. The analytical focus continues to be on the nexus, assessed in

practical terms, between interstate commerce and the challenged activity." *Crane v. Intermountain Health Care, Inc.*, 637 F.2d 715, 724 (10th Cir. 1981) (en banc).

In the intervening years, the Third and Eleventh Circuits have lined up with the Ninth, see *Miller v. Indiana Hosp.*, 843 F.2d 139, 144 n. 5 (3d Cir.), *cert. denied*, 109 S.Ct. 178 (1988); *Cardio-Medical Assoc. v. Crozer-Chester Medical Center*, 721 F.2d 68, 74-75 (3d Cir. 1983); *Shahawy v. Harrison*, 778 F.2d 636, 638-641 (11th Cir. 1985), and the First, Second, Sixth, Seventh, Eighth, and, possibly, the Fourth Circuits have sided with the Tenth, see *Cordova & Simonpietri Ins. v. Chase Manhattan Bank*, 649 F.2d 36, 44-45 (1st Cir. 1981); *Furlong v. Long Island College Hosp.*, 710 F.2d 922, 925-926 (2d Cir. 1983); *Thompson v. Wise Gen. Hosp.*, 707 F.Supp. 849, 855 (W.D.Va. 1989), *aff'd* without published opinion, 896 F.2d 547 (4th Cir. 1990);[1] *Stone v. William Beaumont Hosp.*, 782 F.2d 609, 613-614 (6th Cir. 1986); *Sarin v. Samaritan Health Center*, 813 F.2d 755, 758 (6th Cir. 1987); *Seglin v. Esau*, 769 F.2d 1274, 1280 (7th Cir. 1985); *Doe on Behalf of Doe v. St. Joseph's Hosp.*, 788 F.2d 411, 417 (7th Cir. 1986); *Hayden v. Bracy*, 744 F.2d 1338, 1342-1343 (8th Cir. 1984); *Pariser v. Christian Health Care Systems*, 816 F.2d 1248, 1252-1253 (8th Cir. 1987); see also P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 232.1c, at 238-239 (Supp. 1989).[2]

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[1] Although the Fourth Circuit affirmed the district court in an unpublished opinion, that opinion may under certain circumstances be cited in the Fourth Circuit for its precedential value. See 4th Cir. R. I.O.P. 36.5. That is why we describe the Fourth Circuit as "possibly" aligned with the Tenth.

[2] Not only is there disagreement among the circuits, there is disagreement within the circuits as well. Some of the

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Thus, by 1985, it was obvious that "[m]uch dispute exists in the federal circuits over the content of the elements of the Sherman Act jurisdictional inquiry." *Shahawy v. Harrison*, 778 F.2d at 639. And, as one judge has noted, "In the absence of more definitive guidance from the Supreme Court, it is likely that courts will continue to be divided . . . ." *Stone v. William Beaumont Hosp.*, 782 F.2d at 620 (Holschuh, D.J., concurring); see *id.* at 613 ("The Supreme Court . . . has provided no additional guidance which would resolve the disparity between the circuits").

The instant case presents this Court with an ideal opportunity to give the "definitive guidance" requested by the divided Courts of Appeals. In an action brought by a physician complaining of the termination of his hospital staff privileges, the Court of Appeals here followed the Ninth Circuit "general business activities" rule,[3] holding that to satisfy the Sherman Act's jurisdictional requirement the plaintiff "need *not* . . . [show] the effect on interstate commerce caused by the alleged conspiracy to keep *him* from working," but only "that 'as a matter of practical economics' the activities of the appellees -- the

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opinions rejecting the Ninth Circuit approach have come over strong dissents. See, e.g., *Stone v. William Beaumont Hosp.*, 782 F.2d at 621-623 (Martin, J., concurring in the judgment); *Crane v. Intermountain Health Care, Inc.*, 637 F.2d at 727-728 (Holloway, J., concurring and dissenting).

[3] In addition to *Western Waste*, see *Parks v. Watson*, 716 F.2d 646, 661 (9th Cir. 1983); *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813, 818-819 (9th Cir.), *cert. denied*, 456 U.S. 1011 (1982); see also *Mitchell v. Frank R. Howard Memorial Hosp.*, 853 F.2d 762, 764 (9th Cir. 1988), *cert. denied*, 109 S.Ct. 1123 (1989).

peer review process *in general* – have a 'not insubstantial effect on the interstate commerce involved.' " *Pinhas v. Summit Health, Ltd.*, 894 F.2d 1024, 1032 (9th Cir. 1989) (emphasis added).

Thus, the issue is squarely presented.

II.

RESOLUTION OF THE JURISDICTIONAL ISSUE DETERMINES WHETHER MANY ACTIONS BROUGHT BY PHYSICIANS CONCERNING TERMINATION OR RESTRICTION OF THEIR HOSPITAL STAFF PRIVILEGES WILL BE BROUGHT IN STATE OR FEDERAL COURT.

Deciding the jurisdictional issue presented by this case involves more than just resolving the conflict in the circuits for the sake of resolving a conflict. It is not a mere academic exercise, but will have a substantial effect on whether a large number of cases will be filed in federal court instead of state court. In this section, we explain that choosing between the Ninth Circuit and Tenth Circuit approaches will be the difference between life and death of many Sherman Act cases, particularly the " 'burgeoning number of cases' brought by private physicians under the antitrust laws challenging their exclusion from hospital staff privileges," Comment, *Sherman Act "Jurisdiction" In Hospital Staff Exclusion Cases*, 132 U. Pa. L. Rev. 121, 122 (1983) (footnotes omitted).[4] We also show

[4] Other commentators also have noted the growing number of staff privileges actions being brought under federal

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that, if physician plaintiffs have the option to bring their staff privileges actions in federal court, they will, at least in California, invariably choose that option rather than state court.

In a staff privileges case, a district court recently stated that this Court's *McLain* opinion "has spawned two lines of cases, the first more likely than the second to sustain a plaintiff's jurisdictional allegations." *Litman v. A. Barton Hepburn Hosp.*, 679 F.Supp. 196, 200 (N.D.N.Y. 1988). This is an understatement. The termination or restriction of one physician's hospital staff privileges will rarely have a sufficient effect on interstate commerce to invoke the Sherman Act's jurisdiction, but the general business activities of a hospital will rarely *not* have that jurisdiction-satisfying effect.[5] In any event, "Privilege denials that affect only individual practitioners or local

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antitrust laws. See Carlson, *Physician Credentialing Decisions and the Sherman Act*, 18 Cumb. L. Rev. 419, 419 (1988) ("Physicians who are denied hospital privileges are increasingly turning to federal antitrust laws for relief"); Note, *Quality of Care, Staff Privileges, and Antitrust Law*, 64 U. Det. L. Rev. 505, 506 (1987) ("antitrust litigation involving physician staff privileges has become a very active area"); Enders, *Federal Antitrust Issues Involved in the Denial of Medical Staff Privileges*, 17 Loy. U. Chi. L. J. 331, 331 (1986) ("in recent years no single health care industry practice has been the target of more antitrust lawsuits than hospital denial of medical staff privileges").

[5] There are unusual exceptions. See *Mitchell v. Frank R. Howard Memorial Hosp.*, 853 F.2d at 764-766 (no Sherman Act jurisdiction in case involving 38-bed facility "located in a remote area of northern California over 150 miles from either the Oregon or Nevada borders and over 100 miles from the nearest significant urban center").

communities of practitioners raise the most difficult cases for the interstate commerce test, and these cases invite different results under different approaches." Kissam, Webber, Bigus & Holzgraefe, *Antitrust and Hospital Privileges: Testing the Conventional Wisdom*, 70 Calif. L. Rev. 595, 637 (1982).

The Court of Appeals has recognized that the choice of jurisdictional rule is crucial to many staff privileges actions. The Seventh Circuit accurately noted the stakes involved:

> "Failure to uphold the dismissal of the instant complaint on the ground of lack of any allegations regarding a plausible nexus with interstate commerce would mean that virtually every physician who is ever temporarily denied hospital privileges for whatever reason could drag the hospital and members of its staff into costly antitrust litigation [6] merely by alleging that the defendant receives payments, goods, or equipment in interstate commerce. We decline to encourage this procedure." *Seglin v. Esau*, 769 F.2d at 1283-1284.

Not only could every disgruntled physician drag the hospital and its medical staff into costly antitrust litigation, it will be the rare physician who does not do so and who chooses state court instead. Consider the factors a California physician will evaluate in choosing his or her forum:

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[6] In the present case, not only the hospital and its medical staff are defendants, but so too are the hospital's attorneys, the peer review hearing officer, an employee in the hospital's risk management section, the hospital chief of staff, an officer of the hospital's corporate parent, and several individual physicians.

1. In state court, before a plaintiff can even file a damages action for denial or restriction of staff privileges, he or she must exhaust all administrative remedies within the hospital and then obtain from a court a reversal of the staff privileges decision. *Westlake Community Hosp. v. Superior Court*, 17 Cal.3d 465, 131 Cal.Rptr. 90, 551 P.2d 410 (1976). In a federal antitrust action, as the present case holds, there is no such requirement; to the contrary, suit can be filed even before hospital peer review proceedings are complete. See *Pinhas v. Summit Health, Ltd.*, 894 F.2d at 1030-1031.

2. In state court, a physician plaintiff in a damages action cannot obtain discovery of important peer review committee "proceedings" and "records." Cal. Evid. Code, § 1157; *California Eye Institute v. Superior Court*, 215 Cal.App.3d 1477, 264 Cal.Rptr. 83 (1989), *review denied* (Feb. 21, 1990); *St. Francis Memorial Hospital v. Superior Court*, 205 Cal.App.3d 438, 252 Cal.Rptr. 380 (1988). In a federal antitrust action, on the other hand, the state discovery immunity would be inapplicable and discovery would probably be ordered under federal law. *Memorial Hospital for McHenry County v. Shadur*, 664 F.2d 1058 (7th Cir. 1981); see recently, e.g., *Wei v. Bodner*, 127 F.R.D. 91, 98-100 (D.N.J. 1989). This distinction alone would likely be sufficient reason to opt for federal court. Denying discovery of peer review committee matters "may very well prevent [an antitrust plaintiff] from bringing his action altogether." *Memorial Hospital for McHenry County v. Shadur*, 664 F.2d at 1063; see similarly *California Eye Institute v. Superior Court*, 215 Cal.App.3d at 1485-1486.

3. In federal antitrust actions, successful plaintiffs are entitled to treble damages and attorney's fees, 15

U.S.C. § 15(a) (Supp. 1989), remedies not available in state staff privileges damage actions. This, too, is a compelling magnetic pull to federal court.[7]

Thus, the Ninth Circuit's application of its "general business activities" jurisdictional rule to hospital staff privileges cases could well lead to a wholesale shifting of those cases from the state to the federal courts.

III.

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE DISPUTE AMONG THE CIRCUITS IN FAVOR OF THE MAJORITY RULE REQUIRING A NEXUS BETWEEN INTERSTATE COMMERCE AND THE ALLEGED ANTICOMPETITIVE ACT.

We have so far explained why certiorari should be granted in this case: the issue presented has divided the circuits and its resolution will have a profound impact on the number of Sherman Act cases on federal court dockets. We now briefly discuss why, if certiorari is granted,

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[7] The legislation is not retroactively applicable to the present case, but a California physician now would also consider the qualified immunity provided to peer review participants by the Health Care Quality Improvement Act of 1986. 42 U.S.C. §§ 11111(a), 11112(a). However, California has a similar conditional peer review immunity, Cal. Civ. Code, § 43.7(b), which does not appear to be any more favorable to plaintiffs. The Health Care Quality Improvement Act of 1986 does not affect the jurisdictional issue presented here, although it does indicate that the Ninth Circuit's broad jurisdictional rule is contrary to public policy. In the Act, Congress specifically found that "[t]he threat of private money damage liability under Federal laws, including treble damage liability under Federal antitrust law, unreasonably discourages physicians from participating in effective professional peer review." 42 U.S.C. § 11101(4).

the Ninth Circuit's jurisdictional rule should be rejected in favor of that of the majority of the circuits.

Cases like the present one have been correctly described as "at best at the very margin of the Sherman Act's coverage . . . ." *Furlong v. Long Island College Hosp.*, 710 F.2d at 927. Courts in other staff privileges cases have similarly stated that "it is 'hard to ignore the suspicion that the facts of this case have been forced into an antitrust mold to achieve federal jurisdiction,'" *Seglin v. Esau*, 769 F.2d at 1280, n. 6, and that "the courts should not allow plaintiffs, by charging conspiracies in restraint of trade, to turn every case into a Sherman Act matter," *Thompson v. Wise Gen. Hosp.*, 707 F.Supp. at 855.

Simply stated, cases like the present one, involving alleged anticompetitive conduct against a single physician which has no discernible impact on interstate commerce, should not activate the heavy machinery of the federal antitrust laws. The interstate commerce jurisdictional requirement should screen such cases out of the federal courts. Yet, it has been said that the Ninth Circuit's jurisdictional rule "would in essence eliminate the interstate commerce test from antitrust law, since the total activities of virtually any defendant, no matter how local its business, are likely to have some effects upon interstate commerce." Kissam, Webber, Bigus & Holzgraefe, *Antitrust and Hospital Privileges: Testing the Conventional Wisdom*, 70 Calif. L. Rev. at 632-633.

Even if the Ninth Circuit rule would not make the finding of jurisdiction a foregone conclusion in every case, it would nonetheless lead to arbitrary results unconnected with the purposes of the Sherman Act. As the First

Circuit has noted, "the most local of conspiracies would fall inside, or outside, the Sherman Act, depending upon the fortuitous circumstance of whether a defendant firm happened to be owned by an interstate conglomerate." *Cordova & Simonpietri Ins. v. Chase Manhattan Bank*, 649 F.2d at 45. Thus, although the termination of plaintiff's staff privileges in this case may have had the same negligible impact on interstate commerce as the actions taken against the plaintiff physician in *Mitchell v. Frank R. Howard Memorial Hosp.*, 853 F.2d 762 (see n. 5, *ante*), since the *Mitchell* plaintiff practiced at a small, rural hospital which did not substantially affect interstate commerce while plaintiff here practiced at a hospital which apparently did, one case remains in federal court and the other does not.

CONCLUSION

For the foregoing reasons, defendants' petition for writ of certiorari should be granted.

Respectfully submitted,

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